General Court of the European Union
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Press and Information

Judgments in Cases T-53/08, T-62/08, T-63/08 and T-64/08
Italian Republic, ThyssenKrupp Acciai Speciali Terni SpA, Cementir Italia Srl and Nuova Terni Industrie Chimiche SpA v Commission

The preferential electricity tariff granted to successor companies of Terni constitutes State aid which Italy must recover from those companies

The temporal extension granted in 2005 exceeds the compensation owing for the expropriation suffered in 1962

In 1962, Italy nationalised the electricity sector, setting up the Ente Nazionale per l'Energia Elettrica (ENEL), transferring to it undertakings operating in the electricity industry and granting it a monopoly for the activities relating to that industry. The nationalisation did not cover certain undertakings which produced electricity for their own consumption (self-producers).

Terni, a company in which the State was the majority shareholder, owned and operated a hydroelectric plant and was active in the steel, cement, and chemicals sectors. It was because of its strategic importance for the country's energy supply that Terni's hydroelectricity assets were nationalised despite Terni's status as a self-producer. Terni was compensated through a preferential electricity tariff for the period from 1963 to 1992. The measure in relation to which Terni was the recipient was the combination of three factors: the volume of electricity; the price of that electricity; and the duration of the preferential scheme[1].

The companies which emerged from the split-up of Terni in 1964 − Terni Acciai Speciali, a steel producer, Nuova Terni Industrie Chimiche, a chemicals manufacturer, and Cementir, a cement manufacturer, subsequently privatised and acquired by ThyssenKrupp, Norsk Hydro and Caltagirone − continued to benefit from the preferential tariff.

In 1991, Italy extended, until 31 December 2001, the existing hydroelectric concessions and the preferential tariff. That temporal extension was notified to the Commission, which did not raise objections. The concessions were subsequently renewed until 2020 and the tariff was extended until 2010, which was not notified beforehand to the Commission.

By decision of 2007, the Commission declared that the preferential tariff granted to the three Terni companies was unlawful operating aid. Although the measure was compensation which did not confer any advantage on the recipients throughout the duration fixed by the initial measure (that is, until 1992), the tariff granted as from 2005 constituted State aid. Consequently, the aid which had not yet been paid out could not be implemented and the aid already paid out had to be recovered by the State.

Italy and the successor companies to Terni applied to the Court for annulment of the Commission's decision. They argued, inter alia, that the aid was compensatory in nature and that there had been infringement of essential procedural requirements and breach of the principle of *audi alteram partem* (which requires that the opposing party has a right to be heard) and of the principle of the protection of legitimate expectations.

[1] ENEL shall be required to supply to Terni 1 025 000 000 kWh each year, at 170 000 kW at a preferential tariff determined according to the prices applied during the period 1959 to 1961 by Terni's electricity production branch to the company's establishments operating in other sectors. For excess electricity volume, the price shall be increased by ITL 0.45 per kWh.

The Court, by its judgments delivered today, observes that measures which, in various forms, mitigate the burdens normally included in the budget of an undertaking − such as the supply of goods or services on preferential terms − constitute benefits.

The preferential tariff granted to Terni can be traced back to the nationalisation of the electricity sector in Italy, carried out pursuant to the Italian Constitution and decided upon unilaterally by the State in the public interest. It was granted by way of compensation, for a very specific period (until 31 December 1992) fixed definitively at the time of nationalisation, with no possibility of temporal extension.

The law introducing the preferential tariff and the first temporal extension of that tariff (in 1991) did not in any way link that tariff to the temporal extension of the hydroelectric concessions of the other self-producers whose assets had not been expropriated. The second temporal extension (in 2005) does not make any reference to hydroelectric concessions and there is nothing to indicate that the legislature's intention was to align the duration of the Terni tariff with that of those concessions. Moreover, the nationalisation of an undertaking cannot be equated with a simple contractual fact.

On the contrary, the overall aim of the temporal extension of the preferential tariff is to enable the development and restructuring of the production of the undertakings concerned and is linked to a wide-ranging program of investments which ThyssenKrupp is carrying out in the Terni-Narni industrial area.

As regards compliance with essential procedural requirements, the principle of *audi alteram partem* and the rights of the defence, the Court notes in particular that it has in no way been claimed that the Commission based its decision on the observations of interested third parties in respect of which the Italian Republic was not given an opportunity to express its views. The Commission obtained from Italy a study carried out by an independent consultant in order to compare the value of the expropriated assets with the value of the advantage gained from the preferential tariff since the start of those arrangements until 2010, with updating of the values in question.

The Court further observes that, as regards the review of State aid, the principle of observance of the rights of the defence requires that the Member State concerned be placed in a position in which it may effectively make known its views on the observations submitted by interested third parties. However, the Commission is not required to hear the views of the recipient of State resources or to inform the Member State and/or the aid recipient concerned, before adopting its decision, where the interested parties and the Member State concerned have been given notice to submit their comments.

Moreover, in view of the mandatory nature of the review of State aid by the Commission, undertakings to which aid has been granted may not entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with procedural requirements, that is, following prior notification.

For all the above reasons, the Court dismisses the actions.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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